UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MAHMOUD M. HAMMOUDAH, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 98B00072
	)	
RUSH-PRESBYTERIAN- ST. LUKE'S MEDICAL CENTER, Respondent.	)	MARVIN H. MORSE Administrative Law Judge

ORDER DISMISSING NATIONAL ORIGIN DISCRIMINATION CLAIM, DENYING COMPLAINANT'S MOTION AND INQUIRING FURTHER
(September 28, 1998)

I. PROCEDURAL HISTORY

On December 11, 1997,[1] Mahmoud M. Hammoudah (Complainant or Hammoudah), a naturalized citizen of the United States, filed a Charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleging that Rush-Presbyterian-St. Luke's Medical Center (Respondent or Rush) discriminated against him based on national origin and citizenship status. His cause of action specifies July 22, 1997, as the date he learned that he was not selected for the position of Radiology Therapeutic Physicist to which he applied. The Charge states that Respondent discriminated against Hammoudah when it did not hire him, but instead hired Allen Li, a Canadian citizen of Chinese origin who "is less qualified than [Hammoudah] and has no citizenship status." Hammoudah also alleges that Dr. James Chu (Chu), a United States citizen of Chinese origin who is department head of medical physics, smuggled Li into the United States "by using and twisting the NAFTA agreement." Complainant's Charge acknowledged that Respondent has "15 or more employees." OSC Charge, at ¶ 3.

On April 16, 1998, OSC informed Complainant that it "had not determined that there is reasonable cause to believe the charge is true," it would complete its investigation within 90 days, and Complainant could file his own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

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[1] On November 29, 1997, Complainant signed the charge which was filed on December 11, 1997.

On May 19, 1998, Complainant filed an OCAHO Complaint alleging both national origin and citizenship status discrimination. The Complaint contains the same allegations as the OSC Charge. In addition, Complainant states that Chu hired "others from Chinese origin" who are all "less qualified than me[,]" listing six individuals by name.

On May 21, 1998, the CAHO issued a Notice of Hearing to the parties, advising, *inter alia*, that I am the Administrative Law Judge (ALJ) assigned to the case.

On July 1, 1998, Respondent filed its Answer and a Motion for Partial Summary Decision (Motion). The Answer admits that Complainant applied for the position of Radiology Therapeutic Physicist in February, 1996, and March, 1997. The Answer also raises an affirmative defense ("First Additional Defense") that "[t]here is no jurisdiction to consider Complainant's failure to be hired in 1996 because he did not file a charge alleging discrimination within 180 days after he was informed he was not being hired."

The Motion seeks summary decision and dismissal of Complainant's national origin claim. Respondent's Motion attaches an affidavit of David J. Rice (Rice), Rush's Associate General Counsel and University Counsel, which attests that "[a]t all times relevant to the Complaint Rush has employed at least 15 employees for 20 or more calendar weeks and has been an 'employer' subject to the provisions of Title VII of the Civil Rights Act of 1964."

By an Order dated July 6, 1998, I granted Complainant's request for an extension of time until July 17, 1998, to file a motion for partial summary decision, cautioning Complainant that filing a motion for default judgment due to the untimely filing of the Answer would not likely succeed.

On July 13, 1998, OSC filed a copy of a letter dated July 10, 1998, addressed to Rice, advising of OSC's determination that "[t]here is insufficient evidence of reasonable cause to believe the charging party was discriminated against as prohibited by 8 U.S.C. § 1324b." OSC said it would not be filing a complaint on behalf of Hammoudah.

On July 28, 1998, Complainant filed his "Countermove Respondent Answer"[2] and "Countermove Partial Summary Decision" (Complainant's Motion). In addition to repeating, and explaining in further detail, claims already made in the OSC Charge and the Complaint, Complainant's Motion contends that exceptions to 8 U.S.C. § 1324b(a)(2)(B) permit an ALJ to hear a national origin discrimination claim otherwise within the jurisdiction of the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. § 2000e-2. Complainant contends that his case qualifies for an exception because the "safety of patients" is at risk. Complainant's Motion, at ¶ 3.

[2] Complainant's filing is considered a reply to Respondent's Answer. 28 C.F.R. § 68.9(d).

II. DISCUSSION

A. National Origin Discrimination Claim Dismissed

(1) Grounds for Dismissal

The pertinent Rules of Practice and Procedure, 28 C.F.R. pt. 68 (Rules), which govern this proceeding authorize the ALJ at 28 C.F.R. § 68.10 to dispose of issues and cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief may be granted, but they contain no specific provision for motions to dismiss for lack of subject matter jurisdiction. The Rules, however, provide that the Federal Rules of Civil Procedure (FED. R. CIV. P.) "may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. It is well established that FED. R. CIV. P. 12(b)(1), providing for motions to dismiss for lack of subject matter jurisdiction, and FED. R. CIV. P. 12(h)(3), compelling dismissal of actions where a court lacks subject matter jurisdiction, may be used for guidance in ruling on Respondent's Motion concerning dismissal of the national origin discrimination claim.[3] *Caspi v. Trigild Corp.*, 6 OCAHO 907, at 960 (1997), *available in* 1997 WL 131354, at *2-3 (OCAHO).

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." *Boyd v. Sherling*, 6 OCAHO 916, at 1119 (1997), *available in* 1997 WL 176910, at *5 (O.C.A.H.O.) (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. Supp. 1995). "To determine subject matter jurisdiction, the forum 'must construe and apply the statute under which . . . asked to act.'" *Id.* (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940)). I must, therefore, determine whether I have the authority under 8 U.S.C. § 1324b to hear Complainant's national origin discrimination claim prior to addressing the merits of that claim.

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[3] Because Respondent's Motion, although denominated "Partial Motion for Summary Decision," seeks dismissal of the national origin discrimination claim due to lack of ALJ jurisdiction, treatment as a motion to dismiss for lack of subject matter jurisdiction is appropriate. Summary decision resulting from lack of jurisdiction to hear the national origin discrimination claim is also appropriate because, as discussed *infra* at II(A)(2), Complainant's admission and Respondent's attestation demonstrate that there is no genuine issue as to any material fact regarding Respondent's employment of at least 15 employees during all times relevant to the Complaint. Reaching the same result whether disposition by motion to dismiss or by motion for summary decision, this Order analyzes the national origin discrimination claim as subject to dismissal for lack of subject matter jurisdiction.

(2) Lack of Subject Matter Jurisdiction Established

"It is an unfair immigration-related employment practice for a person or other entity to discriminate against an individual . . . with respect to the hiring . . . of the individual for employment . . . (A) because of such individual's national origin, or (B) . . . because of such individual's citizenship status." 8 U.S.C. § 1324b(a)(1). Title 8 U.S.C. § 1324b(a)(2) sets forth exceptions to the general rule as follows:

> 8 U.S.C. § 1324b(a)(2) Exceptions:
> [8 U.S.C. § 1324b(a)(1)] shall not apply to-
> (A) a person or other entity that employs three or fewer employees, [or]
> (B) a person's or entity's discrimination because of an individual's national origin ***if the discrimination with respect to that person or entity and that individual is covered under section 2000e-2 of Title 42*** . . . .

(emphasis added).

Title 42 U.S.C. § 2000e-2(a)(1)[4] confers national origin discrimination jurisdiction to the EEOC where an employer has "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b) (1998) (defining "employer"). Accordingly, OCAHO jurisdiction over national origin discrimination claims is limited to situations where the employer charged with discrimination employs between four and fourteen employees. "Generally stated, a national origin claim cognizable under Title VII [of the Civil Rights Act of 1964, as amended, codified at Title 42 of the United States Code,] cannot also be the subject of an IRCA national origin discrimination claim."[5] Exceptions to this limitation on OCAHO jurisdiction are created by statute, not by judicial discretion or consent of the parties.[6] *See* 42 U.S.C. § 2000e-2(g) (delineating exception for *national security* reasons); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 753 (1996), *available in* 1996 WL 670177, at *3 (OCAHO) ("while §1324b

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[4] "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1).

[5] *Pioterek v. Anderson Cleaning System, Inc.*, 3 OCAHO 590, at 1921 (1993), *available in* 1993 WL 723364, at *2 (OCAHO) (citations omitted).

[6] *See Boyd v. Sherling*, 6 OCAHO 916, at 1119 (1997), *available in* 1997 WL 176910, at *5 (O.C.A.H.O.) (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (explaining that the forum is "not free to extend or restrict the jurisdiction conferred by statute."); *Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 912 (5th Cir. 1988) ("the parties cannot create federal subject matter jurisdiction either by agreement or consent.")).

national origin discrimination generally is actionable only against employers of more than three but fewer than fifteen individuals, ALJ national origin jurisdiction may arise also as to employers of more than fourteen, by virtue of the national security exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(g).") (citations omitted).

Complainant does not dispute that Respondent employs more than 15 employees. OSC Charge, at ¶ 3. Respondent's Motion to dismiss the national origin discrimination claim is supported by the Rice affidavit which attests that Respondent was subject to "Title VII of the Civil Rights Act of 1964 because it employed 15 or more employees for 20 or more weeks" during all times material to the Complaint. I cannot credit Complainant's claim that because an employee is involved with "the safety of patients" the ALJ is authorized to depart from the jurisdictional limits of either Title VII or 8 U.S.C. § 1324b. Accordingly, because I lack jurisdiction over Complainant's national origin discrimination claim, I grant Respondent's Motion for Partial Summary Decision, dismissing Complainant's national origin discrimination claim.[7]

B. Complainant's Motion for Summary Decision Denied

Complainant's Motion is denied because I do not have jurisdiction over Complainant's national origin discrimination claim. *See* discussion *supra* II(A)(2).

C. Further Inquiry

Dismissing Complainant's national origin discrimination claim, I retain jurisdiction over his citizenship status discrimination claim. Upon review of the pleadings filed to date, it is necessary and appropriate that I direct ***the parties to respond in writing to the judge's information requests stated below no later than October 19, 1998***.

In order to make a prima facie showing that Respondent failed to hire him as a result of citizenship status discrimination in violation of 8 U.S.C. § 1324b(a)(1)(B), Complainant should:

(1) Describe with specificity the basis for his citizenship status discrimination claim.

(2) State whether, and if so, on what basis Complainant contends that Respondent

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[7] OSC and EEOC maintain a Memorandum of Understanding, 54 Fed. Reg. 32499 (1989), which protects an individual who mistakenly files a national origin discrimination claim with the wrong agency. ***Under appropriate circumstances***, each agency acts as an agent for the other for the purpose of receiving such charges, with the result that a filing with the wrong agency will be deemed to be a contemporaneous filing with the correct agency. In any event, as acknowledged in the OSC Charge, at ¶8, and Complainant's Motion, at ¶2, Complainant filed a national origin discrimination charge with the Illinois Department of Human Rights on November 26, 1997.

prefers or has a pattern and practice of hiring Canadian citizens instead of U.S. citizens.

(3) State whether, and if so, on what basis Complainant contends that Respondent prefers or has a pattern and practice of hiring other non-U.S. citizens instead of U.S. citizens.

(4) Describe with specificity whether Complainant submitted two separate applications for the position of Radiology Therapeutic Physicist (a first application in February, 1996, and a second application in March, 1997), or whether the same application submitted for February, 1996, was retained by Respondent and was intended by Complainant and/or Respondent to be used for consideration again in March, 1997.

(5) Describe with specificity when and how Complainant was notified that he was not selected for the position applied for in February, 1996.

(6) State the significance of the following individuals with respect to Complainant's citizenship status discrimination claim, *i.e.*, whether they were hired in positions for which Complainant submitted an application, the citizenship status of each, and the basis of Complainant's knowledge of that status.

a. Chen, Weimin, Ph.D.
b. Hu, Zenan, M.S.
c. Ni, Benwen, Ph.D.
d. Zhou, Shao-Qun, M.S.
e. Cai, Jialing, Ph.D.
f. Virudachalam, Ramasamy, Ph.D.

Respondent should state:

(1) Whether Respondent intends that its affirmative ("First Additional") defense be limited to Complainant's application in February, 1996.

(2) Whether, and if so, by what means, Respondent distinguishes Complainant's application for the position of Radiology Therapeutic Physicist made in February, 1996, from that made in March, 1997.

(3) Describe the citizenship status of the individual hired in 1996 for the position of Radiology Therapeutic Physicist, and specify when and by what means Respondent became aware of that status.

(4) Of the following individuals listed in Complainant's reply to Respondent's Answer, identify whether each is employed or was employed in the past at Rush, listing the position in which each is/was employed, the employment starting and ending dates of each employment, and the citizenship status of each:

a. Chen, Weimin, Ph.D.
b. Hu, Zenan, M.S.
c. Ni, Benwen, Ph.D.
d. Zhou, Shao-Qun, M.S.
e. Cai, Jialing, Ph.D.
f. Virudachalam, Ramasamy, Ph.D.

III. ORDER

For the reasons discussed and set forth in this order:

(1) The national origin discrimination claim is dismissed for lack of jurisdiction; Respondent's Motion for Partial Summary Decision is granted;

(2) Complainant's Motion, "Countermove Partial Summary Decision," is denied; and

(3) The Parties are to provide, and serve, written responses to the questions posed at II(C) not later than October 19, 1998.

SO ORDERED.

Dated and entered this 28th day of September, 1998.

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Marvin H. Morse
Administrative Law Judge